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IN THE

# Supreme Court of the United States

October Term, 1949

No. 248

JOHN HOWARD LAWSON,

*Petitioner.*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

No. 249

DALTON TRUMBO,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## Brief of Alexander Meiklejohn, of Cultural Workers in Motion Pictures and Other Arts, and of Members of the Professions, as Amici Curiae.

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## Brief of Alexander Meiklejohn, of Cultural Workers in Motion Pictures and Other Arts, and of Members of the Professions, as Amici Curiae.

The following named cultural workers in motion pictures and other arts and members of the professions, respectfully urge the favorable consideration by this Court of the pending petitions for writs of certiorari in the above entitled cases for the reasons hereinafter set forth:

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Convinced that issues of as great importance as any with which this court has had to deal of recent years are here presented, those responsible for this brief have deemed it appropriate to elaborate upon a major social issue raised by the appellant which happens to be of special concern to them. This issue has to do with the question of censorship, first, as it affects rights guaranteed

to the petitioner by the Constitution of the United States; and, second, as it relates to the utilization of governmental power by a committee of Congress to impose a censorship upon the motion picture industry. However since both aspects of the matter are inescapably interrelated, they have been dealt with in this brief as presenting a single issue,——censorship. In brief compass, it is our contention:

1. That Congress cannot impose a direct censorship upon the motion picture industry since motion pictures enjoy the same protection under the First Amendment as the press and radio (*United States v. Paramount Pictures,* 334 U. S. 131, 166). Any prosecution arising out of an effort on the part of Congress to impose a direct censorship on the motion picture industry in violation of the First Amendment could not, therefore, be sustained. Since Congress cannot impose a direct censorship upon the motion picture industry, it follows that Congress cannot accomplish by indirection that which it is powerless to accomplish by direct legislation (*United States v. Butler,* 297 U. S. 1; *Child Labor Tax Case,* 259 U. S. 20). On this point it is perhaps sufficient to observe that members of Congress have frankly stated that one of the main purposes of the House Committee on Un-American Activities has been to accomplish by exposure and publicity ends which Congress could not lawfully accomplish by legislation (see: H. R. Rep. No. 2, 76th Congress 1st Sess. 13, 1939; H. R. Rep. No. 1, 77th Congress 1st Sess. 24, 1941; also, 47 *Columbia Law Review* 416 p. 428).

2. That a careful consideration of the record in this case will show that the hearings out of which appellant's

conviction for contempt arose involved an attempt by Congress to impose a censorship upon the motion picture industry in violation of the First Amendment. Since any effort by Congress, directly or indirectly, to impose a censorship upon the motion picture industry would involve an abuse of power, petitioner was not required to lend his assistance to the committee's unconstitutional purpose. Furthermore petitioner was doubly justified in refusing to assist the committee in this enterprise when it became apparent that, as part of its scheme to censor the industry, the committee was compelled to use its power as an agency of government to censor his thinking. In this manner the issue of censorship was brought directly home to the petitioner, as a citizen, for a surrender of his personal privilege or right would necessarily have involved an acquiesence in the scheme by which the committee sought to censor the industry.

The development of these contentions requires (1) a brief statement of the nature of motion pictures as a medium of mass communication and the character of the hearings out of which the citation for contempt arose; and (2) a consideration of certain features of modern political censorships.

* * *

Motion pictures belong in the category of the free arts. In a sense, the motion picture is a composite form in which all the free arts find expression: dance, drama, painting, sculpture, opera, pageant; the plastic and graphic as well as the verbal and literary arts. As a composite form, the making of motion pictures has an influence on the other arts and is in turn influenced by developments in these related arts (see: "The Motion

Picture Industry," *Annals,* American Academy of Political and Social Science, November, 1947, p. 82). Motion pictures have an extraordinary relevance to the maintenance of the democratic ideal since they are essentially a mass medium of communication. The weekly world attendance at motion pictures is estimated at 235,000,000 (*Annals, supra,* p. 1): the weekly attendance in the United States has exceeded 85,000,000 (*Hearings,* p. 1). In its effectiveness as a form of mass communication the motion picture can only be compared with press and radio; yet, as Terry Ramsaye has pointed out, motion pictures exceed both press and radio in the degree to which they are capable of penetrating "the great illiterate and semi-literate strata where words falter, fail, and miss" (*Annals, supra,* p. 1). As an educational medium alone, the motion picture possesses the utmost actual and potential importance (see: *Annals, supra,* pp. 103-109). Of motion pictures it has been said that: "Perhaps no other industry touches so intimately and significantly the lives of so large a proportion of the world's population. Indeed, the motion picture is relatively less important as an economic institution than as a social institution, functioning, with varying degrees of effectiveness and desirability, in the transmission of artistic ideas, the portrayal of human character and human emotions, the description of culture patterns of diverse societal groups, the dissemination of information concerning current affairs, and the interpretation of individual and social experiences. No other industry has so firm and so universal hold upon the popular imagination or so complete command of popular interest" (comments of Dr. Gordon S. Watkins, *Annals, supra,* p. vii). It is precisely the social importance of motion pictures which invests the issue of censorship, in this case, with such commanding significance.

Freedom of artistic expression is, of course, embraced within the guarantees of the First Amendment (*Free Speech in the United States* by Zechariah Chafee, Jr, 1941, 17, 28-30, 154, 366, 529 ff., 545); and this freedom turns on the freedom to develop and express ideas. The birth of an idea and its expression are not two distinct processes: an idea is born in the act of expression or creation. Freedom to the artist, however, means more than mere freedom of expression for it includes all that the artist really wants which is a chance to be heard. "Certainly," writes Dr. W. Rex Crawford, "the symphonic composer will find it a hollow freedom that permits him to put what notes he will on paper, if he cannot find a conductor who will give his work a hearing. The dramatist cannot remain satisfied with reading his bold lines and presenting his novel situations to a group of friends in his library, if every effort to obtain a theater encounters new objections . . . It is small comfort to have won an architectural contest if the design that ranked second is the one the committee chooses to erect" ("Freedom in the Arts," *Annals,* American Academy of Political and Social Science, November, 1938, p. 97). This is not to say that society must provide the composer with an orchestra, the playwright with a theater, and the author with a publisher or stand accused of having denied the meaning of freedom in the arts. But it is to insist that the artist's freedom is violated when he is denied a chance to have his work heard, regardless of its merits, solely because of his political beliefs or affiliations. Under these circumstances it is not merely an individual right of expression that is violated; the denial extends to one aspect of the process by which a society expresses itself, by which a culture is transmitted, by which social change is effected.

## FREEDOM OF EXPRESSION.

Freedom of expression, in its related meanings, has a special significance in the making of motion pictures. Cost factors alone severely limit the number and kind of "ideas" that find expression in motion pictures. Furthermore motion pictures are at the mercy of a mass market of a magnitude and heterogenity unknown to the universe of print or radio. It has been said, in fact, that "movies are far more dependent upon a mass referendum than are other media of communication" (see, *Annals*, American Academy of Political and Social Science, November, 1947, pp. 22, 121, 122). These factors more or less inherent in the nature of the medium, have been re-enforced by the manner in which the motion picture industry has developed as an institution. Because motion pictures started as a medium of "amusement" and "entertainment," without any artistic pretensions, the industry long sought to cultivate a distinction between "entertainment" and "propaganda" as a means of minimizing its social obligations and avoiding responsibility for the fullest development of the new art form. The distinction, of course, is essentially unreal (see, *Annals, supra*, p. 117). Any dramatic presentation which is coherent enough to hold the attention and interest of an audience is in some degree entertaining; and, conversely, the "purest" entertainment film is likely to have hidden psychological or social implications. Hence the treatment of non-conventional subjects is certain to bring forth charges of "propaganda" just as the making of "pure entertainment" films will be denounced as an evasion of social responsibility. In either case the charge stems from the fact that a new art form has not yet been given

a real measure of freedom in the selection and treatment of ideas and subject matter. For it is obviously absurd, and also unfair, to charge the industry with a lack of social responsibility—or with political bias—and at the same time to deny the industry that measure of freedom which alone would stimulate a real sense of responsibility. That the industry has been "unregulated" in the past does not mean that it has been "free."

Those who engage in the production of motion pictures in a democracy have a clear responsibility to further the values upon which such a society is based (a responsibility which derives from the freedom of expression which in theory is guaranteed in such a society); but dictation, direct or indirect, is utterly at variance with the idea of social responsibility. Censorship makes for an evasion, not an acceptance, of real social responsibility. Like the press and radio, the motion picture industry is subject to regulation in the public interest; but the *content* and *ideas* of motion pictures cannot be dictated by a congressional committee any more than such a committee could dictate the editorial policy of the American press. The real question we propose to discuss is, therefore: Did the appellant's conviction arise out of an abuse of the congressional power of investigation or, stated another way, did the committee, in its hearings in this matter, seek to impose a censorship upon the American film industry?

On this point it is important to note that the hearings are entitled: "Hearings Regarding the Communist Infiltration of the Motion Picture Industry." At the opening session, the chairman expressly stated that the purpose of the hearing was to determine the extent to which

Communist influences,—which the chairman carefully failed to define,—had infiltrated the motion picture industry in Hollywood (*Hearings,* pp. 3, 9). Obviously this statement had reference not to the question of ownership or control but to the question of propaganda. In determining the purpose of the hearing, therefore, it is significant that the chairman, with the apparent approval of his colleagues, characterized the purpose in such a manner as to make it unmistakably clear that the committee was directly concerned with the *content* and *ideas* of the American film industry. It would be impossible, obviously, to determine the propaganda content of American films without making a systematic examination of the output of the industry for a stated period, picture by picture, story by story, scene by scene.

**The Meaning of the Hearings.**

The real meaning of the hearings, however, is to be found not in the stated purpose but in the actual utilization of official power by the committee: what it did as an official agency of government, how it proceeded, what it accomplished. Although elaborately disclaiming any intention of imposing a censorship upon the industry (*Hearings,* p. 73), this is precisely what the committee not only sought to accomplish but actually succeeded in doing. The record is replete with suggestions, advanced by the chairman and other members of the committee, that the industry should make "anti-Communist" pictures (*Hearings,* pp. 28, 76, 106, 132, 144, 145, 146, 223, 227, 324). Wholly unambiguous, these suggestions were made in a tone and manner that carried clear overtones of compulsion. The record is also full of suggestions, emanating from the chairman and other members of the committee,

that the industry should make more pictures "extolling the American way of life" (*Hearings,* pp. 29, 237, 307). At the same time the industry was severely criticized —and, more important, *publicly* criticized,—for having made certain motion pictures which were discussed, by name, at considerable length. It will also be noted that the committee discussed with spokesmen for the industry specific details having to do with the content and ideas of films; references, for example, were made to films depicting evil bankers and corrupt congressmen, with the clear implication that the committee did not approve of such characterizations. The objective of the use of official governmental power in all of this was clearly censorial.

The same abuse of power, moreover, is betrayed in the committee's pre-occupation with the role of the writer in the motion picture industry. Not only were the hearings largely concerned with writers, but the committee consistently and carefully stressed the importance of writers to the purpose of the inquiry (*Hearings,* pp. 35, 58, 150, 225). The basis for the committee's interest in writers is, of course, quite clear. In a composite art form like motion pictures, the writer occupies a role or position that is of special interest to the censor. Not that the writer is capable of infiltrating propaganda into films—the manner in which the industry is organized makes this a preposterous supposition,—but because the writer, more directly than the other craftsmen, is concerned with the content and ideas of motion pictures. The "story" is the principal raw material of the industry; every production starts with an idea; and writers are the principal germinators and developers

of ideas in the industry (see: *Annals, supra,* pp. 37-40, 16).

It should also be noted that the committee was concerned not with writers in the abstract but with certain writers; moreover, its concern with these writers was most specific, namely, it wanted these writers discharged from their positions and blacklisted in the industry. The record discloses, most significantly, that the industry was reluctant to discharge the writers under investigation; it was also reluctant to adopt a policy which would be tantamount to a blacklisting of these writers in the industry (*Hearings,* pp. 53, 65, 313, 471, 472). Almost from the opening session, the committee brought pressure to bear upon the industry spokesmen to force them to discharge the writers who had been selected for investigation. At one point the chairman stated: "We hope that by spotlighting these Communists you will acquire that will," meaning the will to dismiss the writers under investigation (*Hearings* pp. 141-142). This was not one of the incidents of the hearings; it was obviously a major purpose. Not only was the suggestion repeatedly advanced that the writers should be dismissed (*Hearings* pp. 49, 50, 53) but at least one member of the committee kept insisting that the Motion Picture Producers Association should blacklist these men in the industry (*Hearings* p. 18). In the context of the hearings, these suggestions must be regarded as more than mere casual hints or gratuitous recommendations; they carried the implied threat of a directly imposed federal censorship in case of noncompliance. What the committee clearly set out to accomplish was a censorship of the industry accomplished through the stratagem of forcing the in-

dustry to discharge a selected group of writers who were identified with a point of view and set of ideas of which the committee disapproved. A purge of ideas was accomplished through a purge of individuals associated or identified with these ideas; in effect this type of censorship might be described as symbolic censorship. That the committee succeeded in forcing the industry, against its better judgment, to discharge the writers under investigation, is merely another way of saying that it succeeded in its strategy of imposing a censorship-by-indirection upon the industry (see: New York *Times,* November 26, 1947, 1:2).

As the history of German and Italian fascism clearly reveals, there can be no more effective censorship of any medium of communication than a purge of the individuals identified with ideas and points of view which the censors want to expurgate. This is not, of course, because the individuals selected for the purge are necessarily persons of outstanding influence and ability; the purge is intended to be symbolic. In the conquest of ideas, the taking of ten hostages can in effect approximate the direct suppression of certain ideas and points of view. This is precisely what Mr. Stripling had in mind when he asked a spokesman for the industry: "Don't you think the most effective way of removing those Communist influences . . . . and I say Communist influences; I am not saying Communists; I am not accusing them all of being Communists . . . but don't you think the most effective way is the payroll route?" (*Hearings* pp. 49-50). Seldom has there been a more explicit statement of a principle basic to the strategy of terror, namely, "you take my life when you do take the means whereby I live."

## The Triangle of Pressure.

The three main "nerves" which modern censorship manipulates, it has been said, are coercion, bribery, and persuasion, or, translated into practical policy, terror, corruption, and propaganda. "The totalitarian engineers," writes Dr. E. K. Bramstedt (*Dictatorship and Political Police: The Technique of Control by Fear,* Oxford University Press, 1945, p. 137), "either threaten man with dangerous insecurity, turning the screw on him by various forms of terror, or they promise him a deceptive security by the cash value of corruption or the mental opium of propaganda. In all these cases they reckon that man will eventually prefer the security of complete submission to the grave risks of an independent attitude. Many advantages of an economic or social kind are promised and sometimes granted. The mind of the masses is filled with colorful suggestions of what is marked as good or bad for them. *It is the combination of these three agencies* which constitutes the mental climate of a dictatorship. Terror, corruption, and propaganda are only three different sides of the same triangle, and it is impossible to recognize its geometrical proportions without taking all three into consideration. All three aim at directing people according to a preconceived pattern of thought and action. They reduce them to an attitude of docile passivity and make them the mere object of intellectual hypnosis, however subtly applied. Man, when successfully approached by any of these three methods, does not act but reacts, he does not think but follows a stimulus. At the end he is enchained by fetters of which he is often only vaguely aware." (Emphasis added.)

Propaganda by government is a method used to divest the people of their right to propagandize. The former is destructive of democracy, the latter is necessary to it.

Only those who ignore the unmistakable contemporary reality embedded in the analysis just quoted can be blind to the fact that the logical and intentional consequence of the contempt citations in this case was the censorship of a particular point of view and of certain ideas in the making of motion pictures and, at the same time, an open encouragement of certain other ideas and points of view. Had the committee subpoenaed a group of newspaper publishers and demanded of them that they discharge and blacklist ten editorial writers, all associated with a certain point of view, the meaning could not have been more unmistakable. To underscore the strategy of the hearings, it should be pointed out that the industry did in fact adopt a general industry-wide "non-Communist" hiring policy. Coupled with the discharge and blacklisting of the ten writers, the adoption of this policy constituted the industry's symbolic acceptance of the unstated alternative offered by the committee, namely, acquiescence in the plan of censorship which we are suggesting or Congress will adopt a program of direct censorship.

So far as other writers in the motion picture industry are concerned, the effect of the discharge of appellant and his colleagues could only be: first, to discourage the submission of any plot, story, or theme which might possibly give rise to an inference that the author was identified with or sympathetic toward the wide range of ideas which the committee insisted that the industry should suppress; and, second, to encourage every writer in the

industry to submit only those ideas, stories, and themes which, by inference, would meet with the approval of the committee. The penalty for failure to comply with this general policy of caution can be most severe, namely, dismissal from the industry. The fact that writers in the industry are well paid (*Hearings* p. 73)—that the prizes for conformity are high—only emphasizes the ease with which an indirect censorship has been imposed on the industry by a committee of the Congress. For there was a dual—although closely related—purpose in the strategy of the committee: just as it sought to coerce and bribe the writers of the industry so it sought to terrorize and corrupt the owners and/or managers of the industry. In effect the spokesmen for the industry were compelled to submit to the will of the committee as the price to be paid for escaping direct censorship and other forms of harassment including the possibility of further public hearings. And there was, of course, a third purpose: namely, propaganda for the millions who followed the hearings in the press, on the radio, or on the screen.

The plan of censorship devised by the committee has a special significance to the individual writer or creative artist in our society. In the past, as the Authors League of America Inc., has stated in a resolution bearing on this case, censorship has commonly "operated only against a work produced and issued to the public, and only to one work at a time . . . Here, however, we are faced with a different form of censorship. Here the man *himself* is proclaimed suspect . . . Indeed, the whole corpus of a man's work, past and future, is thus declared suspect" (*Hollywood on Trial,* p. 146). To emphasize the

meaning of this statement, suffice it to say that Twentieth-Century Fox Film Corporation, subsequent to the contempt convictions in this case, purchased a story by Albert Maltz, one of the writers here involved (New York *Times,* April 1, 1949, April 10, 1949); and then suddenly announced, under obvious pressure, that it would not produce the story (*Variety,* Hollywood, April 13, 1949, Vol. 63, No. 28, p. 1), - - an act of cultural vandalism in one of its ugliest and crudest forms.

**Censorship in Modern Dress.**

The full meaning of the hearings out of which appellant's conviction arose, however, can only be understood in terms of the new censorship which has arisen to plague our times. Although censorships change as times change and new conditions arise, the basic idea of all censorships is the same: to protect an authority based on privilege by a policy of suppressing ideas and opinions (Vol. III, *Encyclopedia of the Social Sciences,* p. 291). Hence the scope of most censorships is commensurate with the area of privilege under attack. For example, the most rigorous of old-style censorships, that of Czarist Russia, left certain areas of intellectual life open to free inquiry and, even as to prohibited fields, was easily evaded (see: *A History of Russian Literature* by Prince D. S. Mirsky, 1927, p. 54). Within the last quarter century, however, a new censorship has arisen which differs in crucially important respects from the censorships of the nineteenth century.

Since the social crisis, as viewed by the modern censors, is now "total," the scope of the new censorships is all-inclusive. Not only has the scope of censorship changed: the methods and techniques of suppression have also

changed. The rigor of any censorship will depend on many factors, including the relative ease and speed of communication. Since nearly anything said or written stands a chance nowadays of being heard or read by large masses of people, and in a brief period of time, modern censorships aim, not merely at preventing or punishing the expression of ideas, but at reaching back one step further to control the process of thought itself. Here the scientific technical apparatus of modern times has revolutionized the methods of censorships (see Bramstedt, *supra,* p. 1.)

The enforcement of conformity has been rightly called the beginning of modern dictatorships. Once the process is launched it must be systematically extended until the last vestige of resistance has been overcome. As Sir Frederick Pollock once pointed out, there is nothing more vicious or damnable than heresy, that is, if you believe in heresy. To those who believe in political heresies, there can be no limit to the right of the state to suppress so grave an evil. The body politic must be "purged" and "cleansed" of all "undesirable" elements and no sooner is the first purge effected than it develops that the purging process must be continuous. Starting usually with the civil service, the purge is rapidly extended to the labor movement, the professions, until, in a thorough and systematic manner, every social and occupational stratum has been coordinated. At this point the party or agency in charge of the purge usually undertakes a purge of its own ranks so as to further "coordinate" the structure of power that is being created in the guise of extirpating heresies.

As rapidly as possible the censorship program is extended to the entire educational system which is "coordinated" through an attack on the concept of academic freedom and a gradual denial, to students and faculty, of the right to entertain unorthodox views. In the social sciences, objectivity quickly becomes a mirage and eventually even the most academic disciplines are directed toward "the closest possible relationship with the national political needs of *our* people" (Neuman, *supra,* p. 196; emphasis added). The "new" education is based, of course, upon a thorough-going proscription of unorthodox beliefs and a systematic indoctrination that permeates every field of inquiry and instruction. As in other areas of social life, this coordination is largely achieved through the taking of "hostages." The coordination of the German colleges and universities was brought about by the dismissal of probably not more than 15 percent of the academic teaching staff (see: *"The German Universities and the Government"* by E. Y. Hartshorne, *Annals,* American Academy of Political and Social Sciences, November, 1938, pp. 210-234). The key to the success of this new technique of the token purge is to be found in "the effect that this politicization has on the remaining academicians" (Neuman, *supra,* p. 196). In the civil service, as in education, "political reliability" becomes the dominant concept. The Nazis brought about a remarkable "coordination" of the German civil service by the dismissal of not more than 10 percent of the bureaucrats (see: *Yale Law Journal,* Vol. 58, p. 131).

As the enforcement of conformity proceeds it becomes necessary for the censors to create a "system of interlocking fears" (Neuman, *supra,* p. 198). In fact the new

censorship is to be distinguished from all censorships of the past by its use of modern technological innovations to bring about an amazingly effective organization of terror with what appears to be a minimum show of force and violence. Every resource of modern technology is brought to bear upon the problem of annihilating the last vestige of resistance or opposition. As conformity becomes an end in itself—an all-consuming public passion,—distrust is practiced as a matter of official policy. Thus the suspect is guilty before he is arrested; counter-espionage becomes the order of the day; and "loyalty" becomes a major obsession. Ostensibly designed to protect the government against revolutionary overthrow by "force and violence," the new censorship proceeds by force and violence to overthrow the rights of the people.

### The Illusion of Acceptance.

Although compelled to use force, the censors are also anxious to create the illusion that their dictates are obeyed out of the cheerful readiness of a seemingly free people. "Every dictatorship," writes Neuman (*supra,* p. 203), "is eager to create the impression of seeming normalcy essential not only to visitors from foreign countries but to its own citizens." For this reason, the new controls proceed by relative indirection; the indirect censorship is preferred to direct control. As pointed out in the *University of Pennsylvania Law Review,* Vol. 96 at p. 399: "The pressure has been toward the development of new devices, untrammelled by such hard-won protective elements (as civil rights), *devices operating indirectly,* imposing new sanctions such as economic deprivation in place of fine and incarceration. The inclination has been to draw within the operation of such techniques those

persons who, because of their position only on the fringes of groups formerly subject to criminal law, could not otherwise be brought under governmental control" (emphasis added). Among the factors which make the use of such indirect techniques feasible is the great extension of propaganda facilities. For example, all modern dictatorships have been quick to use and control motion pictures as part of their propaganda apparatus (see: *The Goebbels Experiment: A Study of the Nazi Propaganda Machine* by Derrick Sington and Arthur Weidenfeld, Yale University Press, 1943, Chapter IX, "The Cinema in the Third Reich," pp. 211-223, where it is pointed out, p. 215, that *control of personnel* was one of the means used to coordinate the industry).

One of the secrets of the success of the new censorship is that it is far more brutal and coercive than it appears to be; most of its dictates, in fact, rest on implied sanctions. Laws are not needed to limit the right of free speech; speech is just as "free" as people feel free to speak. The Commission on Freedom of the Press has given an unequivocal "Yes" in answer to the question,—Is the freedom of the press in danger? Yet no laws have been passed which would challenge the right of a free press. Indeed the new censorship is an aspect of the continued rapid growth of an undemocratic economic structure of power in our society and of the encompassing insecurity which affects every element in the society, the rich as well as the poor. It is this structure of economic power which has tended to rob civil rights of real meaning and significance. "Liberalism," as Dr. John H. Hallowell has reminded us, "was not destroyed by the Nazis . . . rather, the Nazis were the legitimate heirs to a

system that committed suicide" (*The Decline of Liberalism as An Ideology* by Dr. John H. Hallowell, 1946, p. 108). In fact, liberalism has been steadily undermined by the gradual disappearance of individual autonomy and initiative in social and economic life. The new censors, therefore, do not need to imprison armies; a handful of strategically selected hostages, in each group or strata, will suffice for their purposes.

"Pressure" is the key word in the vocabulary of the new censorship. The entire weight of the economic structure can be brought to bear, at any threatened point, in the effort to enforce conformity. For the initial attack, exponents of extreme points of view are usually selected since they can be relied upon to offer open and defiant resistance to the censors. At the outset it is the intransigent, the defiant, witness that the censors elect to degrade and silence, not because this witness is regarded as particularly "dangerous" but because his humiliation will have greater symbolic (*i. e.* propaganda) value than would the humiliation of a less defiant non-conformist. It is not the deeds but the mental attitude of this witness that invests him with importance in the eyes of the censor (see: Bramstedt, *supra,* p. 25). Once the strategic hostages have been selected, every variety of pressure,—coercion, bribery, and persuasion,—is brought to bear to force them to recant. In fact recantation is the real objective of the inquisition. For the new censorship must convert or destroy; it feels menaced by silence. Set in motion at the top, the pressures aimed at securing total conformity are systematically applied throughout every social and occupational strata. The prelude to recantation is the breaking of the will to resist and resistances are

broken by myriad and convergent pressures. The aim of Foché, the dreaded Minister of Police under Napoleon I, as Bramstedt has pointed out, was "not so much the annihilation of the caught bird, but the catching of others. He did not believe so much in violent punishment, but in enforced enlightenment. The prisoner could improve his own position by enlightening the eager police . . . all the worse for him if he failed to realize his own interest" (*supra*, p. 24).

### Economic Subjugation.

Economic subjugation is, of course, one of the most effective pressures for conformity in our society. If the recusant witness is a writer, do not bother to burn his books (a book-burning might call attention to the encroachment on civil rights); simply blacklist him with editors and publishers. Make it difficult for him to communicate with his audience and dangerous for his audience to communicate with him. Convey to him by a thousand suggestions, often subtle, always brutal, an awareness of the fact that certain themes are regarded as "subversive." Dangle rich prizes for conformity before his eyes and rely upon enlightened self-interest to police his thoughts. Make it impossible for him to earn a livelihood by his craft if he fails to conform. Destroy his self-confidence. Create such an atmosphere of hostility toward him that even his children will be shunned by the children of conformists. If he is a clergyman, talk to his trustees. If he is a lawyer, pressure his clients to pressure him. Through skillfully directed propaganda, make this recusant witness a social and moral pariah in the community. Label him; smear him; force him to recant; or, indirect pressures failing, destroy him. But, all the

while, be at great pains to deny that any "punishment" is being inflicted or that any ostracism is intended. Campaigns of this character can be organized without the enactment of a single statute infringing civil rights. For the undemocratic structure of economic power is used to provide the unvoiced threat, the unstated sanction, that can convert a "hint" into a command, a suggestion into a threat.

Those on whose behalf this brief is filed have read the record of the hearings out of which this prosecution arose with a feeling of deep shame and outrage. From first to last the record is one that reflects no credit on American institutions or ideals. We refer not merely to the objectives of the committee but to the manner and method, the tone and temper of the hearings. There was no "hearing" in this matter within any rationally defined meaning of the term; what took place was more in the nature of an ideological lynching, a form of psychological warfare conducted on grossly unequal terms. Every effort was made to humiliate appellant, ostensibly a mere witness before the committee; to focus an image of him on the mirror of American public opinion of such calculated distortion as to make him an object of universal hatred and contempt. Indicative of the committee's sense of fairness is the fact that it brought a parade of "friendly" witnesses to the stand and permitted and encouraged these witnesses to defame appellant and his colleagues without giving the latter any opportunity to protect their reputations. No opportunity whatever was offered the appellant to cross-examine these witnesses or to call witnesses in his own behalf or to make a statement. The more violent and abusive the friendly wit-

nesses became, the more the committee beamed its approval. All the facilities of press, radio, and motion pictures were enlisted to make the humiliation of the appellant a nationwide spectacle (see: 14 *University of Chicago Law Review* 256, p. 267).

The proceedings out of which this prosecution arose are poisoned with a bigotry and petty malice that, even in the brief span of time that has elapsed since the hearings, incites utter amazement and incredulity. It is, indeed, hard to believe that it was a committee of the Congress of the United States which conducted this witch-hunt. As Chief Justice Waite pointed out in *Minor v. Happersett* [88 U. S. 162]: "Allegiance and protection are reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." But here a committee of the Congress withdrew the protection of due process from a group of citizens of the United States in the course of an inquiry into their allegiance to the government,——a most unpleasant spectacle to recall, even in retrospect.

### The Protection of Ideas.

We are not so much concerned, however, with the lack of due process in the hearings or the personal injustice done appellant, as we are with the threat of censorship implicit in this proceeding, the censorship not only of a most important medium of mass communication but of the thought-processes of every craftsmen connected with motion pictures. Still more are we concerned with this censorship as it constitutes a denial that the American people are capable of self-government. The guarantees of the First Amendment secure a public purpose as well as a private right and the public purpose has nowhere

been more clearly stated than in the Report of the Commission on Freedom of the Press (*A Free and Responsible Press,* University of Chicago, 1947, pp. 6-9):

"Freedom of the press is essential to political liberty. Where men cannot freely convey their thoughts to one another, no freedom is secure. Where freedom of expression exists, the beginnings of a free society and a means for every extension of liberty are already present. Free expression is therefore unique among liberties: it promotes and protects all the rest. It is appropriate that freedom of speech and freedom of the press are contained in the first of those constitutional enactments which are the American Bill of Rights.

Civilized society is a working system of ideas. It lives and changes by the consumption of ideas. Therefore it must make sure that as many as possible of the ideas which its members have are available for its examination. It must guarantee freedom of expression, to the end that all adventitious hindrances to the flow of ideas shall be removed. Moreover, a significant innovation in the realm of ideas is likely to arouse resistance. Valuable ideas may be put forth first in forms that are crude, indefensible, or even dangerous. They need the chance to develop through free criticism as well as the chance to survive on the basis of their ultimate worth. Hence the men who publish ideas require special protection.

* * *

Across the path of the flow of ideas lie the existing centers of social power. The primary protector of freedom of expression against their obstructive influence is government. Government acts by maintaining order and by exercising on behalf of free speech and a free press the elementary sanctions

against the expressions of private interest or resentment: sabotage, blackmail, and corruption.

But any power capable of protecting freedom is also capable of endangering it. Every modern government, liberal or otherwise, has a specific position in the field of ideas; its stability is vulnerable to critics in proportion to their ability and persuasiveness. *A government resting on popular suffrage is no exception to this rule.* It also may be tempted —just because public opinion is a factor in official livelihood—to manage the ideas and images entering public debate.

If freedom of the press is to achieve reality, government must set limits on its capacity to interfere with, regulate, or suppress the voices of the press or to manipulate the data on which public judgment is formed.

Government must set these limits on itself, not merely because freedom of expression is a reflection of important interests of the community but also because it is a moral right. It is a moral right because it has an aspect of duty about it.

It is true that the motives of expression are not all dutiful. They are and should be as multiform as human emotion itself, grave and gay, casual and purposeful, artful and idle. But there is a vein of expression which has the added impulsion of duty, and *that is the expression of thought.* If a man is burdened with an idea, he not only desires to express it; he ought to express it. He owes it to his conscience and the common good. The indispensable function of expressing ideas is one of obligation —to the community and also to something behind the community—let us say to truth. It is the duty of the scientist to his result and of Socrates to

his oracle; *it is the duty of every man to his own belief*. Because of this duty to what is beyond the state, freedom of speech and freedom of the press are moral rights which the state must not infringe.

The moral right of free expression achieves a legal status because the conscience of the citizen is the source of the continued vitality of the state. Wholly apart from the traditional ground for a free press—that it promotes the 'victory of truth over falsehood' in the public area—we see that public discussion is a necessary condition of a free society and that freedom of expression is a necessary condition of adequate public discussion. Public discussion elicits mental power and breadth; it is essential to the building of a mentally robust public; and, without something of the kind, a self-governing society could not operate. The original source of supply for this process is the duty of the individual thinker to his thought; here is the primary ground of his right.

This does not mean that every citizen has a moral or legal right to own a press or be an editor or have access, as of right, to the audience of any given medium of communication. But it does belong to the intention of the freedom of the press *that an idea shall have its chance* even if it is not shared by those who own or operate the press. The press is not free if those who operate it behave as though their position conferred on them the privilege of being deaf to ideas which the processes of free speech have brought to the public attention." (Emphasis added.)

In this country we have never acquiesced in the proposition that persons could be punished for their beliefs any more than we have approved the theory that beliefs *per se*

can be banished from men's minds by fear or compulsion. Belief is a domain that lies beyond speech and statement. Freedom of speech and of press are indispensable aspects of self-government; but freedom of belief rests on our concept of the moral freedom of the person. We have always insisted that the person must be regarded as morally free since only by this insistence are we justified in drawing the inference of responsibility upon which the theory of self-government rests. Under our system of government, therefore, we do not reject a policy by arresting the persons who have proposed it. "The essence of our political theory," writes Mr. E. B. White (New York *Herald-Tribune,* December 2nd, 1947), "in this country is that a man's conscience shall be a private, not a public affair, and that only his deeds and words shall be open to survey, to censure and to punishment. The idea is a decent one, and it works. It is an idea that cannot safely be compromised with, lest it be utterly destroyed. It cannot be modified even under circumstances where, for security reasons, the temptation to modify it is great . . . One need only watch totalitarians at work to see that once men gain power over other men's minds, that power is never used sparingly and wisely, but lavishly and brutally and with unspeakable results. If I must declare today that I am not a Communist, tomorrow I shall have to testify that I am not a Unitarian. And the day after that I have never belonged to a dahlia club. It is not a crime to believe anything at all in America."

The American tradition, in this respect, merely follows the established maxim of the law which runs *Cogitationis poenam nemo meretur* ("No one deserves punishment for his thought"). In one form or another this maxim occurs in all the standard collections of maxims, including the one of Broom (10th ed. by Kersley, 1939). It is cited as an authoritative statement of law in our courts. *Cf McDermott v. Pyle,* 5 Parke Cr. (N. Y.) 102; which again is cited for this maxim in *State v. Taylor,* 47 Ore. 455, 8 Ann. Cases 627; 4 L. R. A. N. S. 417.

The maxim is derived from the Corpus Juris of Justinian. It appears in the *Digest,* Book 48, Title 19, Sec. 18, and is there quoted from the great jurist, Ulpian, who died in 228 A. D. It was regarded as sufficiently important so that, brief as it is, it forms a section of the title by itself. It was repeated in the Byzantine revision of the Corpus Juris, the Basilica (b. 60, 17), put together in the ninth century. The Glossators of the thirteenth century note it particularly and cite other illustrations. It is a well-known fact that these Glossators exercised a considerable influence on the founders of the common law, especially on Bracton.

Even in the common law of treason, where it has been frequently declared that there is an exception to this principle, because under the Statute of Treason of 1350 (25 Edw. 3, st. 5, c. 2) "imagining" or "compassing" the death of the King was included, it has been pointed out that the statute itself—which in part has been taken over into the Constitution of the United States—demands quite

explicitly an *overt* act as proof of the "imagining" and "compassing." And in the revival of the statute in the first year of Mary (1553) there is an express denunciation, in the preamble, of those who punish people for *words alone* "without fact or deed." The notion that thoughts could be punished, without even words, would have been abhorrent even during the quasi-absolutism of the Tudors. *Cf.* Kenny, C. S. *Outlines of Criminal Law,* 15th ed. (1936) 41-42.

The maxim *cogitationis poenam nemo meretur* was widely quoted by civilians and canonists. Every now and then it was uneasily explained away by some jurists in their eagnerness to carry out the arbitrary decrees of their masters. But the great majority pointed out that these "interpretations" were perversions. The maxim was not a casual assertion; on the contrary, it was placed in a deliberately conspicuous position in the Digest title called, "On Punishment," which dealt with the theory and practice of punishment under the law. It is worthy of note that in a dictionary of canon and civil law of 1759, edited by Bynkershoek, the maxim is quoted with the concluding words *coram terreno tribunali,* "before an earthly tribunal." The suggestion is made, therefore, that before a heavenly tribunal thoughts might be punishable. Whether or not the Committee on Un-American Activities of the House of Representatives feels that it can claim a standing higher than that of an earthly tribunal we need not conjecture but we may assume that this Court makes no such pretension.

## Conclusion.

Concerned as we are with the social implications of the issues in this case, we most respectfully urge the court to decide these issues upon the basis of broad principle and in a manner that will provide a real guide to American policy. A reversal of the petitioner's conviction will not necessarily settle the issue discussed in this brief but a reversal based upon the guarantees of the First Amendment would go far toward arresting the trend toward censorship of thought and opinion of which this case is a most significant manifestation. In the last three decades, this court has vindicated and upheld the guarantees of the First Amendment in a manner and with a courage that is quite beyond praise. Now the court is being asked, in this case, to vindicate these same guarantees against encroachment by the federal Congress in an abuse of the important power of investigation. We can appreciate the seriousness of the issue which is thus presented to the court but we are convinced that the mere fact that the transgressor in this instance happens to be a committee of the Congress will not blunt the force of the precedent with which this court has upheld the American Bill of Rights.

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